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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

BOARD OF COMMISSIONERS OF
THE PORT OF NEW ORLEANS,

Plaintiff,

v.

VIRGINIA HARBOR SERVICES,
INC., et al.,

Defendants.

Case No. SACV11-00437-GW
(FFMX)

**[PROPOSED] PROTECTIVE
ORDER**

**NOTE CHANGES MADE BY
COURT**

Magistrate Judge: Hon. Frederick F.
Mumm
Courtroom: E-9th Floor

[PROPOSED] PROTECTIVE ORDER

1 WHEREAS, Plaintiff Board of Commissioners of the Port of New Orleans,
2 on behalf of itself and the Class (“Plaintiff”) and the undersigned Defendants,
3 through their respective counsel of record, having stipulated to the following
4 protective order pursuant to Fed. R. Civ. P. 26(c) (“Protective Order”) to govern
5 the production of documents and things, the filing of documents, and the disclosure
6 of **deposition (FFM)** testimony in the above-captioned action (“Action”) with this
7 Court, and having further moved this Court to so order this Protective Order; and

8 WHEREAS, the Court has reviewed the terms and conditions of this
9 Protective Order submitted by the parties,

10 It Is Hereby ORDERED That:

11 **A. Scope**

12 1. This Protective Order governs the use and handling of
13 documents, **deposition (FFM)** testimony, interrogatory responses, responses to
14 requests for admission, and other information, including all copies, excerpts and
15 summaries thereof produced or supplied by Defendants, Plaintiff or other
16 individuals or entities, including non-parties to this action.

17 2. Under this Protective Order, any producing or supplying party
18 (hereafter “producing party”) shall have the right to identify and designate as
19 “Confidential” any material and/or information it produces or provides, which the
20 party reasonably believes (i) is not in the public domain (i.e., not generally known
21 and not reasonably ascertainable by proper means), and (ii) contains any non-
22 public trade secret or confidential research, development, or commercial
23 information as such terms are used in Fed. R. Civ. P. 26(c)(1)(G). The party will
24 designate such material and/or information as confidential (hereafter “designated
25 material”) if such party has a good faith belief that the designated material is
26 entitled to confidential treatment.

27 3. Confidential information as used herein means any designated
28 material that is designated by the producing party as “Confidential” pursuant to

1 this Protective Order, whether it is a document or information contained in a
2 document, disclosed during a deposition ~~or other testimony~~, (FFM) disclosed in an
3 interrogatory answer or otherwise disclosed.

4 4. Material that is designated as confidential information and
5 which a party believes to be extremely sensitive confidential and/or proprietary
6 information, the disclosure of which, even limited to the restrictions placed on
7 confidential information in this Protective Order, may compromise and/or
8 jeopardize the producing party's business interests, may be designated as "Highly
9 Confidential" by said party.

10 5. A party may designate as Confidential or Highly Confidential
11 material that is in the possession of a third party if the material contains that party's
12 Confidential or Highly Confidential information.

13 6. Any documents filed with the Court by a producing party in
14 pleadings or otherwise by the party that produced those documents in this litigation
15 shall no longer be deemed "Confidential" or "Highly Confidential" unless the party
16 filing the documents has filed such information under seal pursuant to the
17 procedures provided herein.

18 7. Any material produced in this litigation shall be used only for
19 purposes of this litigation, including material that has not been designated as
20 "Confidential" or "Highly Confidential." Such information shall not be used for
21 any business, competitive, personal, private, public or other purpose. No material
22 shall be disclosed to any party or counsel who seeks at any time to pursue claims
23 other than these Class Claims, **except as otherwise provided herein. (FFM)**

24 **B. Designation of Confidentiality**

25 Documents or information may be designated Confidential or Highly
26 Confidential within the meaning of this Protective Order as follows:

27 8. Specific documents produced by a party shall, if appropriate, be
28 designated as Confidential or Highly Confidential by marking each page of the

1 document containing Confidential or Highly Confidential information with:
2 “Confidential,” “Confidential - Subject To Protective Order,” “Highly
3 Confidential” or “Highly Confidential - Subject To Protective Order.”

4 9. In the case of interrogatory answers and responses to requests
5 for admissions, if appropriate, the designation of Confidential or Highly
6 Confidential information shall be made by means of a statement in the answers or
7 responses specifying that the answers or responses or specific parts thereof are
8 designated Confidential or Highly Confidential. The following shall be placed on
9 each page of interrogatory answers or responses to requests for admission
10 containing Confidential Information or Highly Confidential information: “Contains
11 Confidential Information” or “Contains Highly Confidential Information.”

12 10. In the case of depositions and the information contained in
13 depositions (including exhibits), designation of the portions of the transcript
14 (including exhibits) that contain Confidential Information or Highly Confidential
15 Information shall be made by a statement to such effect on the record in the course
16 of the deposition by counsel for the party or the witness producing such
17 information, or by letter from such counsel within thirty (30) days of receipt of the
18 deposition transcript or copy thereof (or written notification that the transcript is
19 available). The entire deposition transcript (including exhibits) shall be treated as
20 Highly Confidential under this Protective Order until the expiration of the above-
21 referenced thirty-day period for designation, except that the deponent may review
22 the transcript of his or her own deposition during this thirty-day period. The
23 following shall be placed on the front of the original deposition transcript and each
24 copy of the transcript containing Confidential Information or Highly Confidential
25 Information: “Contains Confidential information” or “Contains Highly
26 Confidential Information.” To the extent possible, the court reporter shall
27 segregate into a separate transcript information designated as “Confidential” or
28 “Highly Confidential.” The separate transcript containing “Confidential” or

1 “Highly Confidential” information shall have page numbers that correspond to
2 blank or redacted pages in the main transcript and each such page will be marked
3 as “Confidential” or “Highly Confidential.” If all or part of a videotaped
4 deposition is designated as Confidential or Highly Confidential, the videocassette
5 or other videotape container shall be so labeled.

6 11. To the extent that information stored or recorded in the form of
7 electronic or magnetic media (including information, files, databases, or programs
8 stored on any digital or analog machine-readable device, computers, discs,
9 networks or tapes) (“computerized material”) is produced by any party in such
10 form, the producing party may designate such matter as Confidential or Highly
11 Confidential by cover letter referring generally to such matter or by labeling such
12 media accordingly.

13 12. To the extent that any party or counsel for any party creates,
14 develops or otherwise establishes on any digital or analog machine-readable
15 device, recording media, computer, disc, network, tape, file, database or program
16 information designated Confidential and/or Highly Confidential, that party and/or
17 its counsel must take all necessary steps to ensure that access to such media is
18 properly restricted to those persons who, by the terms of this Protective Order, may
19 have access to Confidential Information and/or Highly Confidential Information.
20 Whenever any party to whom computerized material designated as Confidential or
21 Highly Confidential is produced reduces such material to hard-copy form, such
22 party shall mark such hard-copy form as provided above.

23 **C. Disclosure of Confidential Information**

24 13. Counsel of record are responsible for employing reasonable
25 measures, consistent with this Protective Order, to control access to and
26 distribution of information designated Confidential.

27 14. Access to information designated Confidential pursuant to this
28 Protective Order shall be limited to:

- 1 a. A director, officer, employee or agent of any party to the
2 Action to whom the designated material is shown for purposes of the Action;
- 3 b. Counsel for any party to the Action (including members,
4 of counsel or associates of such counsel's firm) or in-house counsel for any party
5 to the Action, as well as their paralegal, secretarial, investigative, and clerical
6 personnel who are assisting such counsel in the Action;
- 7 c. Outside photocopying, data processing or graphic
8 production services employed by the parties to assist in the litigation;
- 9 d. Any individual who prepared, received, reviewed, is
10 referred to in, or otherwise had been provided access to designated material prior
11 to its production in the Action;
- 12 e. Any witness or potential witness as to whom a party has
13 a good faith basis to believe that such person has relevant information regarding
14 the designated material;
- 15 f. Any expert or consultant (or any employee of such expert
16 or consultant) who is not employed by or affiliated with any party to the Action
17 and is retained by a party for the purposes of consulting and/or testifying in the
18 Action;
- 19 g. Any current employee of a party producing designated
20 material;
- 21 h. This Court or any other Court exercising jurisdiction with
22 respect to the Action, including Court personnel, jurors, and persons recording,
23 taking, or transcribing testimony or argument at any deposition, hearing, trial or
24 appeal in the Action; and
- 25 i. Any other person pursuant to a court order or to whom
26 the producing party agrees to provide such disclosure so long as the producing
27 party grants permission in writing or on the record in advance of disclosure.
28

1 **D. Disclosure of Highly Confidential Information**

2 15. Counsel of record are responsible for employing reasonable
3 measures, consistent with this Protective Order, to control access to and
4 distribution of information designated Highly Confidential.

5 16. Access to information designated Highly Confidential pursuant
6 to this Protective Order shall be limited to:

7 a. Outside counsel for any party to the Action (including
8 members, of counsel or associates of such counsel's firm) as well as their
9 paralegal, secretarial, investigative, and clerical personnel who are assisting such
10 counsel in the Action;

11 b. Outside photocopying, data processing or graphic
12 production services employed by the parties to assist in the litigation;

13 c. Any individual who prepared, received, reviewed, is
14 referred to in, or otherwise had been provided access to designated material prior
15 to its production in the Action;

16 d. If a corporate party as defined in Paragraphs 14-17 or a
17 Named Co-Conspirator as defined in Paragraphs 24-26 of the complaint filed in
18 this Action is referenced in information designated Highly Confidential, any past
19 or present employee of that corporate party or Named Co-Conspirator to whom the
20 receiving party has a good faith belief is the subject of said reference;

21 e. Any expert or consultant (or any employee of such expert
22 or consultant) who is not employed by or affiliated with any party to the Action
23 and is retained by a party for the purposes of consulting and/or testifying in the
24 Action;

25 f. Any current employee of a party producing designated
26 material;

27 g. This Court or any other Court exercising jurisdiction with
28 respect to the Action, including Court personnel, jurors, and persons recording,

1 taking, or transcribing testimony or argument at any deposition, hearing, trial or
2 appeal in the Action; and

3 h. Any other person pursuant to a court order or to whom
4 the producing party agrees to provide such disclosure so long as the producing
5 party grants permission in writing or on the record in advance of disclosure.

6 17. Each person to whom disclosure is made pursuant to
7 Paragraphs 14(a), 14(e), 14(f), and 16(d) and 16(e) shall be given a copy of this
8 Protective Order and shall sign a declaration prior to disclosure, a copy of which is
9 attached hereto as Exhibit A, agreeing that he or she is bound by the jurisdiction of
10 this Court and the terms of this Protective Order. The party (or its counsel)
11 obtaining the declaration shall provide copies of each declaration to all other
12 counsel of record.

13 **E. Restrictions And Procedures Regarding Confidential Or Highly**
14 **Confidential Material**

15 18. Persons receiving Confidential or Highly Confidential material
16 are prohibited from disclosing it to any person except in conformance with this
17 Protective Order. The recipient of any Confidential or Highly Confidential
18 material that is provided under this Order shall maintain such information in a
19 secure and safe area and shall exercise the same standard of due and proper care
20 with respect to the storage, custody, use and/or dissemination of such information
21 as is exercised by the recipient with respect to its own proprietary information.

22 19. If any party or counsel for any party wishes to disclose any
23 Confidential or Highly Confidential information in any affidavits, briefs,
24 memorandum of law, oral argument, or other papers filed in the Court in this
25 action, such papers or transcripts may be filed under seal only upon separate,
26 specific motion and later order of the Court. For purposes of this paragraph, if any
27 party or counsel for any party intends to submit any affidavits, briefs,
28 memorandum of law, or other papers disclosing the Confidential or Highly

1 Confidential information of another party in this action, such disclosing party shall
2 contemporaneously file a motion provided for in this paragraph requesting that the
3 designated material be filed under seal.

4 20. If, at any time, any Confidential or Highly Confidential
5 information in the possession, custody or control of any person other than the
6 person who originally produced such information is subpoenaed by any court,
7 administrative agency, legislative body or other person or entity, the party or
8 person to whom the subpoena or request is directed shall promptly provide written
9 notice to the person who originally produced such information and/or to the
10 designating party, which notice shall include the date set for the production of the
11 subpoenaed information. ~~Within seven (7) days, the producing party will inform~~
12 ~~the subpoenaed party either that it does not object to production of the information~~
13 ~~or that it will seek court protection to prevent the production. The subpoenaed~~
14 **party must not produce the information prior to the due date specified in the**
15 **subpoena. (FFM)**

16 21. ~~If the original producing party responds that it will not seek~~
17 ~~court protection, then the subpoenaed party may produce the information. If the~~
18 ~~original producing party fails to provide the subpoenaed party with a response as to~~
19 ~~whether or not it will object to or seek court protection, the subpoenaed party may~~
20 ~~produce the information after seven (7) days following the subpoenaed party's~~
21 ~~notice of the subpoena to the original producing party. If the original producing~~
22 ~~party does elect to seek court protection, then the subpoenaed party will not~~
23 ~~produce the subpoenaed information on the date set for the production of the~~
24 ~~subpoenaed information. Notwithstanding the foregoing, the original producing~~
25 ~~party waives its right to object to production if it does not object to production or~~
26 ~~seek court protection on or before the date that production is due, and, in that~~
27 ~~circumstance, the subpoenaed party may provide the subpoenaed information.~~
28 **(FFM)**

1 22. Nothing herein shall restrict or limit the use of information or
2 documents designated as “Confidential” or “Highly Confidential” at any hearing or
3 trial, which is expected to be the subject of a further protective order and/or
4 appropriate court orders. Prior to any hearing or trial at which the use of such
5 information or documents is anticipated, the parties shall meet and confer
6 regarding the use of confidential materials containing such designations. If the
7 parties cannot agree, the parties shall promptly request the Court to rule on such
8 procedures.

9 **F. Objections to Designations**

10 23. A party shall not be obliged to challenge the propriety of a
11 Confidential or Highly Confidential information designation at the time made, and
12 a failure to do so shall not preclude a subsequent challenge thereto. In the event a
13 party objects to the designation of any material under this Protective Order, the
14 objecting party shall consult with the designating party to attempt to resolve their
15 differences. If the parties are unable to reach an accord as to the proper
16 designation of the material, after giving notice to the party who designated the
17 material, the objecting party may apply to the Court for a ruling that the material
18 shall not be so designated. If such a motion is made, the designating party has the
19 burden of establishing that the designation is proper. If no such motion is made,
20 the material will retain its designation. **Any such motion must comply with**
21 **Local Rule 37. (FFM)** Any documents or other material that has been designated
22 Confidential or Highly Confidential shall be treated as Confidential or Highly
23 Confidential until such time as the Court or any magistrate to whom this matter is
24 assigned rules that such material should not be treated as Confidential or Highly
25 Confidential. Nothing in this Protective Order is intended to create a presumption
26 in favor of confidentiality, and this Protective Order does not alter applicable law
27 regarding burdens of proof when challenging a Confidential or Highly Confidential
28 designation.

1 **G. Preservation of Rights and Privileges**

2 24. Nothing contained in this Protective Order shall affect the right,
3 if any, of any party or witness to make any other type of objection, claim, or other
4 response to discovery requests, including, without limitation, interrogatories,
5 requests for admissions, requests for production of documents or questions at a
6 deposition. Nor shall this Protective Order be construed as a waiver by any party
7 of any legally cognizable privilege to withhold any Confidential or Highly
8 Confidential information, or of any right which any party may have to assert such
9 privilege at any stage of the litigation.

10 **H. Return or Destruction of Material**

11 25. Within one hundred twenty (120) days after the final resolution
12 of this action, all Confidential or Highly Confidential information shall be returned
13 to counsel for the party that produced it or shall be destroyed. As to the material
14 that contains or reflects Confidential or Highly Confidential information, but that
15 constitutes or reflects counsel's work product, counsel of record for the parties
16 shall be entitled to retain such work product in their files in accordance with the
17 provisions of this Protective Order, so long as it is clearly marked to reflect that it
18 contains information subject to this Protective Order. Counsel shall be entitled to
19 retain pleadings, affidavits, motions, briefs, other papers filed with the Court,
20 deposition transcripts, and the trial record (including exhibits) even if such
21 materials contain Confidential or Highly Confidential information, so long as such
22 materials are clearly marked to reflect that they contain such information.

23 **I. Inadvertent or Unintentional Disclosure**

24 26. The inadvertent or unintentional disclosure by the producing
25 party of documents or information subject to a claim of privilege, including, but
26 not limited to, the attorney-client privilege or work product doctrine, regardless of
27 whether the material was so designated at the time of disclosure, shall not be
28 deemed a waiver in whole or in part of a party's claim of privilege.

1 27. A producing party that inadvertently fails to designate material
2 as Confidential or Highly Confidential pursuant to this Protective Order at the time
3 of its production shall be entitled to make a correction to its designation. Such
4 correction and notice thereof shall be made in writing within twenty (20) days of
5 discovery of the inadvertent mis-designation, accompanied by substitute copies of
6 each item of material, appropriately designated. Those individuals who received
7 the material prior to notice of mis-designation by the producing party shall within
8 five (5) days of receipt of the substitute copies, destroy or return to the law firm
9 representing the producing party all copies of such mis-designated documents.
10 Those individuals who reviewed the mis-designated material prior to notice of the
11 mis-designation by the producing party shall abide by the provisions of this
12 Protective Order with respect to the use and disclosure of any information
13 contained in the mis-designated material.

14 28. If a party has inadvertently or mistakenly produced information
15 subject to a claim of privilege, or otherwise protected from disclosure, the
16 producing party shall, within twenty (20) days of discovery of such inadvertent or
17 mistaken production, serve a written request upon the receiving party for return of
18 the same. The receiving party of inadvertently produced material will return such
19 item or items and all copies thereof within ten (10) days of receiving a written
20 request from the producing party for the return of same. If the receiving party
21 challenges a claim that such information is privileged or otherwise protected from
22 disclosure, the receiving party may, in connection with any good faith challenge,
23 make reference to the contents of the inadvertently produced material in a
24 document filed with the Court only if such document is filed in connection to a
25 motion challenging or opposing the assertion of privilege, and only so long as such
26 filing is made under seal. If requested by the receiving party, the producing party
27 shall provide the purportedly privileged material to the Court for in-camera review.
28 If the Court sustains the privilege claim of the producing party with respect to

1 inadvertently produced material, the receiving party shall, within five (5) days of
2 the Court's Order, destroy any notes relating to the material and advise the
3 producing party in writing of the destruction.

4 29. A party's compliance with the terms of this Protective Order
5 shall not operate as an admission that any particular material is or is not (a)
6 confidential, (b) privileged or (c) admissible in evidence at trial.

7 30. A non-party who is obligated to provide discovery in this action
8 by deposition, production of documents or otherwise, shall be afforded the
9 protections of this Protective Order upon signing the declaration attached hereto as
10 Exhibit A. By signing such declaration, the nonparty also agrees to be bound by
11 the terms of this Protective Order.

12 31. Upon the final resolution of this Action, any party may seek
13 leave to reopen this Action to enforce the provisions of this Protective Order.

14 32. This Protective Order is binding on all parties to this Action and
15 also on all nonparties who have signed the attached Exhibit A, and this Protective
16 Order shall remain in force and effect until modified, superseded, or terminated by
17 consent of the parties or by further Order of the Court.

18
19 SO ORDERED this 20th day of May, 2011

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21 /S/ FREDERICK F. MUMM
22 Honorable Frederick F. Mumm
23 United States Magistrate Judge
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